

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JULY 19, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 94-2274

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

AMERICAN MOTORS CORPORATION,

Plaintiff-Appellant,

v.

**LABOR AND INDUSTRY
REVIEW COMMISSION, and
MICHAEL D. CHAMBLEE,**

Defendants-Respondents.

APPEAL from an order of the circuit court for Kenosha County:
BARBARA A. KLUKA, Judge. *Reversed.*

Before Anderson, P.J., Brown and Snyder, JJ.

ANDERSON, P.J. American Motors Corporation (AMC) appeals from an order of the circuit court affirming the order by the Labor and Industry Review Commission (LIRC) which awarded certain worker's compensation benefits to Michael D. Chamblee. Because we conclude that AMC did not commit bad faith when it delayed payment of Chamblee's

medical bills, we reverse.

Chamblee was employed by AMC installing wiring harnesses on the production line. He began having right wrist pain in September 1987 and was taken off of work for three to four weeks. Although Chamblee returned to work, he continued to experience problems. In November 1988, he was examined by Dr. Jose Kanshepolsky. After EMG and nerve conduction studies were performed, Kanshepolsky interpreted the studies as revealing bilateral ulnar nerve entrapment and right carpal tunnel syndrome. He referred Chamblee to John Dembowskiak for physical therapy.

Kanshepolsky scheduled Chamblee for surgery on January 10, 1989. AMC, however, scheduled an independent medical exam with Dr. James White on January 9, 1989, and the surgery was postponed. White did not disagree with the surgery and on January 24, 1989, Kanshepolsky performed a right ulnar nerve transposition and right carpal tunnel release. On February 2, 1989, Chamblee resumed physical therapy treatments which continued through June 30, 1989.

According to LIRC's findings of fact, AMC "did not make any payment on Dr. Kanshepolsky's bills for surgery or treatment rendered subsequent to December 8, 1988 (\$3,725), on any of Dr. Douglas' bills (\$1,620), on any of Mr. Dembowskiak's bills (\$4,081), or on [Chamblee's] mileage expenses to and from Mr. Dembowskiak and Dr. Kanshepolsky (\$379.05)." On April 20, 1989, AMC told Chamblee that the bills were under review and they would not be paid until after the review. In February 1989, AMC had retained Mercer

Meidinger Hansen, an organization specializing in analyzing medical bills and treatment, to investigate Chamblee's case.

Chamblee filed a claim alleging that AMC acted in bad faith when it failed to pay his medical bills. An administrative law judge (ALJ) found that none of the outstanding bills from Kanshepolsky, Douglas or Dembowski had been fairly debatable and assessed a \$15,000 penalty for bad faith.

AMC appealed the ALJ's decision to LIRC. LIRC held that AMC had no reasonable basis for delaying payment of the surgical bills to St. Luke's Hospital, one-third of Douglas's charges, Dembowski's charges and Kanshepolsky's charges, and assessed bad faith penalties against AMC. AMC appealed LIRC's decision to the circuit court.¹ The circuit court held that "LIRC's findings are supported by credible and substantial evidence." AMC appeals.

"Whether a delay in payment resulted from bad faith is a mixed question of law and fact." *North American Mechanical, Inc. v. LIRC*, 157 Wis.2d 801, 809, 460 N.W.2d 835, 840 (Ct. App. 1990). We will sustain LIRC's findings of fact if they are supported by credible and substantial evidence. *Kimberly-Clark Corp. v. LIRC*, 138 Wis.2d 58, 67, 405 N.W.2d 684, 688 (Ct. App. 1987). Whether facts fulfill an appropriate legal standard is a question of law. *Id.* at 66, 405 N.W.2d at 688. This court is not bound by an administrative

¹ This case had previously been before the circuit court where the court reversed the interlocutory order of LIRC and remanded the file to LIRC for findings of fact with respect to the necessity and reasonableness of Chamblee's medical expenses.

agency's conclusion when reviewing questions of law. *Id.* "However, when a legal conclusion is so intertwined with the factual findings supporting that conclusion, the appellate court should give some weight to the fact finder's decision." *Id.* Therefore, we will give some weight to LIRC's decision as to whether the claim was fairly debatable.

Under Wisconsin's worker's compensation law, bad faith is assessed in the following manner:

The department may include a penalty in an award to an employee if it determines that the employer's or insurance carrier's suspension of, termination of or failure to make payments or failure to report injury resulted from malice or bad faith. ... The department may, by rule, define actions which demonstrate malice or bad faith.

Section 102.18(1)(bp), STATS. WISCONSIN ADM. CODE § IND 80.70(2) provides:

An insurance company or self-insured employer who, without credible evidence which demonstrates that the claim for the payments is fairly debatable, unreasonably fails to make payment of compensation or reasonable and necessary medical expenses, or after having commenced those payments, unreasonably suspends or terminates them shall be deemed to have acted with malice or in bad faith.

In *Kimberly-Clark*, a worker's compensation case, the court adopted the criteria for a bad faith claim set forth in *Anderson v. Continental Ins. Co.*, 85 Wis.2d 675, 691, 271 N.W.2d 368, 376 (1978). *Kimberly-Clark*, 138 Wis.2d at 65, 405 N.W.2d at 688. In order to show a claim for bad faith, an employee must show the absence of a reasonable basis for denying benefits and the employer's knowledge or reckless disregard of the lack of a reasonable basis for denying

the claim. See *id.*

The court in *Kimberly-Clark* went on to apply the *Anderson* criteria to § 102.18(1)(bp), STATS.:
[T]he issue of bad faith is reached only after a final award has been made to the claimant. A hearing examiner then examines the record to determine if there was any credible evidence which would demonstrate that the claim was fairly debatable. If the examiner finds that there is no credible evidence which the employer or insurer could rely upon to conclude that the claim was fairly debatable, the examiner then determines if the employer's or insurer's actions in denying payment were reasonable. This test is an objective one from the standpoint of the employer or insurer: Would a reasonable employer or insurer under like or similar circumstances have denied or delayed payment on the claim.

When deciding whether the employer's actions were reasonable, it is necessary to determine if the claim was properly investigated and if the results of the investigation were subject to a reasonable evaluation and review.

Kimberly-Clark, 138 Wis.2d at 65, 405 N.W.2d at 688.

AMC contends that there is no medical evidence in the record supporting the “reasonableness of the prices or the necessity of the treatment.” We agree with Chamblee that, under the circumstances of this case, the reasonableness and necessity of medical expenses do not have to be determined before there is a finding of bad faith. Neither § 102.18(1)(bp), STATS., nor WIS. ADM. CODE § IND 80.70 requires such a determination, and we will not read one into these provisions. See, e.g., *State v. Engler*, 80 Wis.2d 402, 410, 259 N.W.2d

97, 101 (1977).

Chamblee argues that “[t]he delay in payment of the medical bills in this case is sufficient to give rise to a finding of bad faith.” Chapter 102, STATS., contemplates three types of conduct stemming from delay in payment: (1) excusable delay; (2) inexcusable delay, though not in bad faith; and (3) bad faith delay. *North American Mechanical*, 157 Wis.2d at 808-09, 460 N.W.2d at 839-40.

We conclude that AMC's delay was excusable delay. An employer has the right to properly investigate a claim. See *Anderson*, 85 Wis.2d at 692, 271 N.W.2d at 377. Whether a claim was properly investigated is an appropriate determination when applying the test for bad faith. *Id.* AMC's investigation into the reasonableness and necessity of certain medical bills and treatment was justified under the circumstances.² The record provides evidence that AMC could have reasonably suspected that the doctor's treatment and bills were not reasonable and necessary. In his report, White stated that he had difficulty

² According to the commission's findings, AMC did pay parts of Chamblee's claim: “The employer conceded and paid temporary disability for appropriate periods through July 16, 1989, and also conceded and paid one percent permanent partial disability at the right wrist. ... [I]t also paid all the \$1,265 in medical charges from Dr. Kanshepolsky, which had accrued through December 8, 1988. On May 15, 1989, it paid the St. Luke's Hospital surgery bill in the amount of \$1,158.38.”

interpreting the EMG nerve conduction studies done by Douglas. Furthermore, in an earlier decision, the commission stated that it “has found overcharging in previous cases involving these medical providers.” AMC retained a medical bill audit organization by February 1989. There was no bad faith in waiting for the audit. At the hearing, a doctor from the audit organization testified that when doing “a medical record review, it can easily take six months between the time we request the record and the time we actually generate a report—six or even eight months” AMC waited approximately six and one-half months to receive the audit report, which was not unreasonable.

We conclude that LIRC lacked any credible and substantial evidence to conclude that AMC acted in bad faith. In this case, the claim for certain medical expenses was fairly debatable, *see North American Mechanical*, 157 Wis.2d at 807, 460 N.W.2d at 839, and thus, AMC did not act in bad faith.

By the Court.—Order reversed.

Not recommended for publication in the official reports.